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IN THE
COURT OF APPEALS OF INDIANA

STEVEN W. EVERLING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0903-CR-153
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0802-FA-75

August 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Steven Everling was convicted of three counts of Child Molesting,[1] as class A felonies, and two counts of Sexual Misconduct with a Minor,[2] as class B felonies. Everling presents four issues for our review, which we consolidate and restate as:

1. Was Everling denied his right to a fair and impartial trial?

2. Did Everling receive effective assistance of trial counsel?

3. Did the trial court abuse its discretion in sentencing Everling?

We affirm and remand.

The facts most favorable to the convictions follow. K.P. was born on August 21, 1989. K.P.'s parents divorced when K.P. was approximately two years old, and K.P.'s mother subsequently married Everling. Until she was in the 6th grade, K.P. was a happy child who received good grades in school. Shortly thereafter, her grades fell and she became depressed, angry, and withdrawn.

In the late summer of 2002, just before K.P.'s thirteenth birthday, Everling began molesting K.P. During the first incident, Everling went into K.P.'s bedroom after K.P.'s mother left for work and fondled her breasts, starting on the outside of her clothes and ultimately moving his hands under her shirt and to her bra. Everling eventually put his hands down his own pants and appeared to masturbate. The incident lasted approximately ten minutes. Later, as K.P. was getting ready to go next door to her grandparents' home, Everling stopped K.P. at the door, apologized for what he had done, and then threatened to

[1] Ind. Code Ann. § 35-42-4-3 (West, PREMISE through Public Laws approved and effective through 4/20/2009).

[2] I.C. § 35-42-4-9 (West, PREMISE through Public Laws approved and effective through 4/20/2009).

kill K.P. if she told anyone. K.P. was afraid of Everling because she knew he kept a switchblade knife in his vehicle and he had hit her with his fists on prior occasions. K.P.'s fear of Everling intensified because she believed Everling killed her two dogs, one of which was found decapitated. After K.P. turned thirteen, Everling fondled her on several more occasions and would masturbate during some of the encounters.

In April 2003, K.P., her mother, and Everling moved into a home in Elwood, Indiana. During the summer of 2003, Everling began having oral and vaginal sex with K.P. The first such encounter occurred just before K.P.'s fourteenth birthday. Everling went into K.P.'s bedroom after her mother had gone to work, took K.P.'s and his pants off, inserted his penis into K.P.'s vagina, and ejaculated inside of her. This incident caused K.P. pain and she had bleeding for awhile thereafter. After the encounter was over, Everling told K.P. to take a shower because she would stink. K.P. worried about getting pregnant, but Everling assured her that she would not get pregnant because he had had a vasectomy.

During the second sexual encounter, which also occurred prior to K.P.'s fourteenth birthday, Everling had K.P. lie on her abdomen and then he inserted his penis into her vagina from behind and ejaculated inside of her. Everling had sex with K.P. ten to twelve times before her fourteenth birthday. While having intercourse, Everling often instructed K.P. to tell him "how big his dick was." *Transcript* at 329.

During other incidents, Everling would place his penis in K.P.'s mouth and tell her to "suck his dick." *Id*. at 328. Everling would often ejaculate in K.P.'s mouth. The sexual acts always took place in the morning after K.P.'s mother left for work. On some occasions,

Everling would keep K.P. home from school. Between K.P.'s fourteenth and sixteenth birthdays, Everling had oral sex with K.P. at least six times and had vaginal intercourse with K.P. approximately thirty times. K.P. testified that Everling would buy her alcohol and cigarettes and that he helped buy her a car.

Around her seventeenth birthday, K.P. disclosed to her father's sister that Everling had been molesting her for years. K.P. explained the delay in coming forward was because Everling threatened to kill her if she told anyone. When K.P.'s father found out about the molestations, he contacted proper authorities, and K.P. gave a statement to the police.

In August 2006, K.P. was evaluated by and received counseling from mental health clinician Charla Hazen. In taking down K.P.'s history, Hazen learned from K.P. that Everling started molesting and having sexual intercourse with her just before she turned thirteen years old. K.P. told Hazen that the first incident of sexual intercourse resulted in her "being injured and torn" and that Everling had sex with her again before the injury had time to heal. *Id*. at 196. K.P. talked to Hazen about nightmares she was having. Hazen described K.P. as having a flat affect and as internalizing her emotions. Hazen characterized K.P.'s symptoms as chronic and severe. In Hazen's opinion, K.P. was suffering from post-traumatic stress disorder (PTSD). Hazen's opinion was corroborated by Dr. Timbali, a psychiatrist, who also evaluated K.P. and diagnosed her with PTSD. K.P.'s counseling sessions with Hazen were stopped shortly after they began because of issues with insurance. K.P. began counseling with Hazen again in January 2008. K.P. still suffers from nightmares and sleeping problems and has difficulty trusting people.

In July 2008, sexual assault nurse Holly Rentz examined K.P. During the forensic examination, Nurse Rentz observed an "old" tear on K.P.'s hymen that had healed. *Id*. at 286. Nurse Rentz took pictures of the injury, but had to detail her findings through her testimony as the injury was not readily visible in the pictures. Nurse Rentz explained that the location of the injury to K.P.'s hymen was consistent with K.P.'s claim of being penetrated while lying on her stomach. K.P. also told Nurse Rentz that she did not disclose the molestation earlier because Everling had threatened to kill her.

On February 25, 2008, the State charged Everling with three counts of class A felony child molesting (Counts 1, 2, and 5) and two counts of class B felony sexual misconduct with a minor (Counts 3 and 4). On June 10, 2008, the State filed a motion requesting defense witness and exhibit lists. The trial court granted the motion and ordered Everling to provide his witness and exhibit lists within ten days. When Everling failed to comply with the order, the State, on July 15, 2008, filed a motion to exclude. Everling filed his witness and exhibit lists on October 23, 2008 (five days before trial), and on October 24, 2008, the trial court granted the State's motion to exclude and specifically ruled that the defense was not permitted to call any witnesses other than the defendant himself.

A month prior to the start of trial, on September 23, 2008, Everling filed a verified motion for change of judge. The same day, Everling's trial counsel filed a complaint against the trial judge in this cause with the Indiana Commission on Judicial Qualifications regarding a matter in an unrelated cause.[3] On October 1, 2008, the trial court held a hearing regarding

[3] The record does not disclose the outcome of this proceeding.

Everling's change-of-judge motion, and ultimately denied the motion without hearing argument from Everling's trial counsel.[4] The day the jury trial was scheduled to begin, Everling asked the trial court for a stay of proceedings and a continuance, but the trial court denied both. That same day, Everling's trial counsel filed a writ of mandamus for an emergency stay of proceedings. Our Supreme Court denied the emergency stay, but ordered additional briefing with regard to the merits of the writ. On November 24, 2008, our Supreme Court denied the writ of mandamus.

Everling's trial commenced on October 28, 2008, as scheduled. At the conclusion of the evidence, the jury returned verdicts finding Everling guilty of all counts. The trial court subsequently sentenced Everling to forty years on each A felony child molesting conviction and fifteen years on each B felony sexual misconduct conviction. The trial court ordered the sentences on Counts 1 (40 years) and 3 (15 years) to be served consecutively and the sentences on Counts 2 (40 years) and 4 (15 years) to be served consecutively. The 40-year sentence on Count 5 was ordered to be served concurrent with the sentences imposed on Counts 1 through 4, for a "total of fifty-five (55) years."[5] *Id*. at 625.

1.

Everling argues that he was denied his right to a fair and impartial trial. Specifically, Everling argues that he was denied the opportunity to present witnesses on his behalf when

[4] Everling's trial counsel made a record of his argument and evidence without the presence of the trial judge.

[5] The chronological case summary (CCS) sets forth the sentence as above delineated, but further indicates that the consecutive sentences for Counts 1 and 3 are to be served consecutively to the consecutive sentences imposed on Counts 2 and 4, "for a total sentence of 110 years." *Appellant's Appendix* at 7. The CCS entry is at odds with the trial court's oral sentencing statement.

the trial court granted the State's motion to exclude the witnesses identified on his witness list and denied him the right to have Dr. Philip Merk testify.

The Sixth Amendment to the United States Constitution "guarantees a defendant the right to present witnesses on his behalf." *Farris v. State*, 818 N.E.2d 63, 69 (Ind. Ct. App. 2004), *trans. denied*. "[W]hile the right to present witnesses is of the utmost importance, it is not absolute." *Roach v. State*, 695 N.E.2d 934, 939 (Ind. 1998). Trial courts are afforded wide discretion in matters such as the course of proceedings, exclusion of evidence, and violations. *Vasquez v. State*, 868 N.E.2d 473 (Ind. 2007). The U.S. Supreme Court has made clear that, depending on the circumstances, excluding a witness may be appropriate or it may be unconstitutional. *Taylor v. Illinois*, 484 U.S. 400 (1988). Indiana jurisprudence recognizes a strong presumption to allow defense testimony, even of late-disclosed witnesses: "The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State." *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986). Factors helpful in determining whether to exclude a witness include:

> "(i) when the parties first knew of the witness; (ii) the importance of the witness's testimony; (iii) the prejudice resulting to the opposing party; (iv) the appropriateness of lesser remedies such as continuances; and (v) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness's testimony."

Vasquez v. State, 868 N.E.2d at 476 (quoting *Williams v. State*, 714 N.E.2d 644, 651 n.5 (Ind. 1999)). Even if we find error in the trial court's exclusion of witnesses, we will deem such error harmless if its probable impact on the jury, in light of all of the evidence in the case, is

sufficiently minor so as not to affect the defendant's substantial rights. *Williams v. State*, 714 N.E.2d 644.

Everling argues that the trial court abused its discretion in excluding his witnesses simply because his counsel missed the deadline by nearly four months for submitting his witness list to the State. Everling also asserts that the trial court made no finding that his failure to file his witness list was purposeful or intentional or that the State was substantially or irreparably prejudiced thereby. Everling further points out the court's failure to consider the five factors identified above.

Here, on June 10, 2008, the State filed a motion requesting a defense witness and exhibit list and on June 20, 2008, the trial court granted the motion and ordered Everling to provide his witness and exhibit list to the State within ten days. Everling failed to comply with the court's order, and on July 15, 2008, the State filed a motion to exclude. As noted above, Everling's counsel did not file a witness list until five days prior to the start of trial, nearly four months after the deadline set in the trial court's order. On the first day of the trial, the State acknowledged that it had "talked" to some of the witnesses identified on Everling's witness list, *Transcript* at 45, but indicated that it was completely unaware of what they would testify to. In response, Everling's counsel explained that the witnesses would essentially provide alibi testimony or were character witnesses.

With regard to alibi witnesses, it is undisputed that Everling failed to file a notice of alibi within the time constraints found in Ind. Code Ann. § 35-36-4-1 (West, PREMISE through Public Laws approved and effective through 4/20/2009) (defendant must file a notice

of intent to offer an alibi defense no later than twenty days prior to the omnibus date if the defendant is charged with a felony). Additionally, Everling did not make known to the State his intent to present an alibi defense until the first day of trial when he was questioned about the nature of the testimony of the belatedly disclosed witnesses. With regard to these witnesses, Everling claims they would have testified about K.P.'s character and bias. Again, the State was not informed of what their proffered testimony would be until the morning of the start of the trial.

Clearly, the State's presentation of its case would have been impacted by the testimony from these witnesses. We further recognize that while a short continuance may not have prejudiced the State, testimony from these witnesses would not likely have affected the outcome of the trial. To be sure, under the facts of this case, we find it difficult to conceive how an alibi defense could have been successful. The alibi witnesses would have had to provide testimony that they were with Everling every morning over the course of years, as K.P. provided no specific dates when the molestations occurred, but testified only that the numerous incidents occurred over the course of several years.

As to exclusion of character witnesses, we again fail to see how such would have affected the outcome of the trial. K.P. testified as to specific incidents of molestation over a period of more than three years. K.P.'s testimony was unequivocal and unwavering. From the record before us, there was overwhelming evidence of Everling's guilt such that testimony from Everling's alleged alibi witnesses and character witnesses would likely have had little or no affect on the outcome.

We turn now to the trial court's exclusion of Dr. Phillip Merk, a witness Everling disclosed to the State on the second day of trial. Specifically, Everling claimed that Dr. Merck, if permitted, would have testified he had reviewed K.P.'s medical records and he observed no injury to K.P.'s genitalia. The trial court excluded Dr. Merck as a witness because of the defense's late disclosure and because Dr. Merck had not examined K.P. himself, but rather his testimony was to be based on Nurse Rentz's notes and pictures taken during her forensic exam.[6] The State argues, and we agree, that the late disclosure of this witness was prejudicial to the State's case. Moreover, we note such testimony was only marginally probative in light of the strong evidence from K.P. of Everling's guilt.

Under the circumstances of this case, even if it was error for the trial court to exclude Everling's witnesses, including Dr. Merck, Everling has not established that his substantial rights were affected. *See Williams v. State*, 714 N.E.2d 644.

Everling also argues that he was not afforded a trial before an impartial judge. It is well established that a trial before an impartial judge is an essential element of due process. *Ruggieri v. State*, 804 N.E.2d 859 (Ind. Ct. App. 2004) (citing *Abernathy v. State*, 524 N.E.2d 12 (Ind. 1988)). "The impartiality of a trial judge is especially important due to the great respect that a jury accords the trial judge and the added significance that a jury might give to any showing of partiality by the trial judge." *Id*. at 863. To assess whether the trial judge has crossed the barrier of impartiality, we examine both the trial judge's actions and demeanor.

[6] We recognize that the State did not provide Everling with Nurse Rentz's photographs, which she took during her exam of K.P., until twelve days before trial. Everling nevertheless waited until trial was underway to inform the State about Dr. Merk and his proposed testimony.

Timberlake v. State, 690 N.E.2d 243 (Ind. 1997). We are mindful, however, that the trial judge must be given latitude to run the courtroom and maintain discipline and control of the trial. *Id*. We will presume that a judge is unbiased and unprejudiced. *Id*.

"'Even where the court's remarks display a degree of impatience, if in the context of a particular trial they do not impart an appearance of partiality, they may be permissible to promote an orderly progression of events at trial.'" *Id*. at 256 (quoting *Rowe v. State*, 539 N.E.2d 474, 476 (Ind. 1989)). In other words, "a defendant must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced the defendant's case." *Id*.

Everling asserts that the trial court's lack of impartiality is evidenced by its actions both prior to and during his jury trial. Everling points out that his trial counsel filed a motion for change of judge after his trial counsel filed a disciplinary complaint against the trial court in an unrelated case. The trial court denied Everling's motion for change of judge without allowing Everling's trial attorney to present evidence or argument. Everling also points to the trial court's exclusion of his witnesses as evidence of bias against him, claiming that the trial court treated him differently than it did the State with regard to discovery matters. Everling also directs us to numerous exchanges between the trial court and Everling's trial counsel, wherein he alleges the trial court acted improperly toward defense counsel. For example, during one exchange (outside the presence of the jury), the trial court criticized trial counsel's voir dire strategy and in another exchange (outside the presence of the jury) referred to "unethical things" trial counsel had done in court on previous occasions.

Transcript at 394.

Without addressing each allegation separately, we conclude that the trial court's actions and demeanor did not cross over the bounds of partiality. That a complaint was filed against the trial judge by Everling's trial counsel in an unrelated case does not establish that the trial court was biased against Everling. *See Tyson v. State*, 622 N.E.2d 457 (Ind. 1993). With regard to discovery matters, we find nothing out of the ordinary in the trial court's treatment of Everling as compared with its treatment of the State. The State filed its witness list as required and as the case moved forward, kept Everling updated of new developments and witnesses by amending its witness lists. The trial court also permitted the State to amend the charging information to correct apparent scrivener's errors. There was no such good faith effort on behalf of Everling's trial counsel, who filed his witness list days before trial and on the day of trial, advised the State of a possible alibi defense. Indeed, the trial court found that Everling's trial counsel had simply "ignored" the court's prior orders with regard to timelines for submitting discovery. *Transcript* at 51.

With regard to the trial court's demeanor, we note that some of the trial court's comments arose because of the judge's impatience with trial counsel. The trial judge also expressed his frustration with trial counsel's repeated attempts to violate court orders and rulings and repeated attempts to proffer irrelevant or previously excluded evidence. We further note that many of the comments were made outside the presence of the jury. The verbal exchanges or comments made in front of the jury were in the context of the trial and did not demonstrate an actual bias toward Everling. Having reviewed the record, Everling

has wholly failed to establish that he received a trial in front of an impartial judge or that he was prejudiced in any way. *See Timberlake v. State*, 690 N.E.2d 243.

2.

Everling argues that his trial counsel rendered ineffective assistance. Specifically, Everling contends that his trial counsel, Zaki Ali, failed to provide effective assistance in that he failed to timely file his exhibit and witness lists as ordered by the trial court and did not timely file a notice of alibi. Everling maintains that he was prejudiced by Attorney Ali's deficient performance in that he was prevented from presenting the majority of his witnesses. The State does not dispute Everling's claim that his trial counsel's representation was deficient. The State asserts, however, that Everling has not established prejudice resulting from such deficient performance.

To prevail upon a claim of ineffective assistance of trial counsel, a defendant must demonstrate both that his trial counsel's performance was deficient and that he was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Polk v. State*, 822 N.E.2d 239 (Ind. Ct. App. 2005), *trans. denied*. Counsel's performance is deemed deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Polk v. State*, 822 N.E.2d 239. To establish the resulting prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694. Failure to satisfy either element will cause the

ineffectiveness claim to fail, and most ineffectiveness claims can be resolved by a prejudice inquiry alone. *Polk v. State*, 822 N.E.2d 239.

We note that Everling brings his claim of ineffective assistance of trial counsel on direct appeal. While this is not prohibited, a post-conviction proceeding is generally the preferred forum for adjudicating claims of ineffective assistance of counsel because presenting such claims often requires the development of new facts not present in the trial record. *See Jewell v. State*, 887 N.E.2d 939 (Ind. 2008); *McIntire v. State*, 717 N.E.2d 96 (Ind. 1999); *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998). Although a defendant may choose to present a claim of ineffective assistance of counsel on direct appeal, if he so chooses, the issue will be foreclosed from collateral review. *McIntire v. State*, 717 N.E.2d 96; *Woods v. State*, 701 N.E.2d 1208. In *Woods*, our Supreme Court observed that this rule would "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." 701 N.E.2d at 1220.

Here, it is true that trial counsel failed to comply with the court's order regarding the timely filing of an exhibit and witness list (including a synopsis of each witness's proposed testimony), and indeed waited until five days prior to trial to submit only a portion of the requested information (i.e., the witness list with no synopsis) to the State. Trial counsel also did not file a notice of alibi and yet, sought to present an alibi defense at trial. As a result of these failings, which were never explained by Attorney Ali, Everling was not permitted to call any witnesses other than himself. In this regard, trial counsel's performance was clearly deficient.

Despite counsel's deficient performance, we cannot discern if Everling was prejudiced thereby based on the record before us. As we have noted before, ineffective assistance of counsel claims based solely on the trial record "'almost always fail.'" *Id*. at 1216 (quoting *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991)). This is such a case. Clearly there is a need for further record development in order to gauge the prejudice, if any, suffered by Everling as a result of his trial counsel's deficient performance. Indeed, with regard to the alibi witnesses, Everling asserts that the excluded witnesses would have testified generally to being around Everling during morning hours. Having only the trial record before us, it is unclear how such testimony would have aided Everling's defense. K.P. testified that Everling molested her and had intercourse with her in the morning hours after her Mother left for work, but she did not give exact dates. Rather, K.P.'s testimony revealed that the molestations took place over the course of several years. It is difficult to conceive of a plausible alibi defense to the allegations at hand. Everling has failed to establish a reasonable probability that testimony from such witnesses would have affected the outcome of the trial. The same analysis applies to the character witnesses excluded as a result of trial counsel's failure to timely file a witness list. Based on the record before us, Everling cannot establish prejudice resulting from trial counsel's deficient performance. His claim of ineffective assistance of counsel therefore fails.

3.

Everling argues that the trial court abused its discretion in sentencing him to an aggregate term of 110 years and that his sentence is inappropriate. Before addressing the

merits of Everling's argument, we must first address a discrepancy in the record as to the precise sentence imposed. In the trial court's oral sentencing statement, it set forth the sentence for each conviction and stated the sentence was "[a] total of fifty-five (55) years." *Transcript* at 625. The abstract of judgment accurately reflects the sentence as announced by the trial court during the sentencing hearing. As noted in footnote 5, *supra*, the CCS indicates that the consecutive sentences for Counts 1 and 3 were to be served consecutively to the consecutive sentences for Counts 2 and 4, for a total aggregate sentence of 110 years.

When dealing with a discrepancy between an oral and written sentencing statement, we will review both the written and oral sentencing statements to discern the findings of the trial court. *McElroy v. State*, 865 N.E.2d 584 (Ind. 2007). "Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusion of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing." *Id*. at 589.

Here, it appears as though the trial court intended to impose a total sentence of fifty-five years. We simply cannot, however, reconcile the trial court's oral and written sentencing statements, both of which contain specific, contradicting statements as to the total sentence imposed. In light of the ambiguity, we elect to remand to the trial court for clarification of the sentence imposed. We will therefore not address Everling's argument that his sentence is inappropriate.

For purposes of sentencing clarification, we will address Everling's claim that the trial

court relied on two improper aggravating circumstances. During the sentencing hearing, the trial court identified the following aggravating factors: (1) Everling was in a position of trust with the victim; (2) the victim was diagnosed with PTSD; (3) Everling kept the victim home from school so that he could commit these acts against her; and (4) there were multiple acts. In mitigation, the court noted that Everling had no criminal history and that incarceration would pose a hardship on Everling's family, but further indicated such hardship "is just part of it. There's no way around that." *Transcript* at 624. The trial court found the aggravating circumstances outweighed the mitigating circumstances.

Everling argues that the trial court abused its discretion when it found as an aggravating circumstance that K.P. suffered from PTSD as a result of the molestations. In this regard, Everling maintains that the court made no finding that the emotional harm suffered by K.P. was greater than that usually associated with the crime. *See Thompson v. State*, 793 N.E.2d 1046 (Ind. Ct. App. 2003). The record reveals that K.P. was diagnosed with PTSD and that she suffered nightmares, had trouble sleeping, and developed an inability to trust people. Mental health clinician Hazen, who treated K.P. for PTSD, described K.P.'s symptoms as severe and chronic. The trial court did not abuse its discretion in considering the emotional impact suffered by K.P.

Everling also challenges the trial court's reliance on the fact that he kept K.P. home from school "for these activities," which the court noted was "educational neglect." *Transcript* at 624. Everling asserts that he was not charged with educational neglect and that it was an abuse of discretion for the trial court to rely on such finding as an aggravating

circumstance. It is true that Everling was not charged with educational neglect. This, however, does not preclude the trial court from considering the fact that he kept K.P. home from school. Here, keeping K.P. home from school ensured that Everling had the opportunity to commit his crimes undisturbed. The trial court did not abuse its discretion in considering this aggravating factor.

The trial court did not abuse its discretion in articulating the aggravating and mitigating factors that underlie the sentence imposed. Nevertheless, because the record contains inconsistent statements as to the total sentence imposed, we remand to the trial court for clarification.

We affirm and remand for clarification.

BAKER, C.J., and RILEY, J., concur.